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# IN THE
# COURT OF APPEALS OF INDIANA

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| TIMOTHY TURNER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 32A04-0603-CR-113 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable J.V. Boles, Judge
Cause No. 32C01-0506-FB-7

**DECEMBER 12, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**HOFFMAN, Senior Judge**

Defendant-Appellant Timothy Turner appeals his convictions of criminal deviate conduct, a Class B felony, Ind. Code § 35-42-4-2, and child molesting, a Class C felony, Ind. Code § 35-42-4-3. We affirm.

Turner presents three issues for our review, which we restate as:

I. Whether the trial court erred by admitting Turner's confession into evidence at trial.

II. Whether the trial court erred by admitting the victim's out-of-court statements into evidence under the protected person statute.

III. Whether there was sufficient evidence to sustain Turner's convictions.

Turner lived with his father, his stepmother, and his stepbrother, B.T. From September 2001 to November 2002, they lived with Turner's paternal grandmother, who was terminally ill. During the time the family was living with her, Turner molested B.T. B.T.'s parents were unaware of the molestations until B.T.'s mother noticed suspicious behavior between eleven-year-old B.T. and his eight-year-old cousin, D.H. When B.T.'s parents asked about this behavior, B.T. indicated that he had been molested by Turner. An investigation into B.T.'s allegations followed, and Turner was eventually charged with three counts of criminal deviate conduct as Class B felonies and one count of child molesting as a Class C felony. Following a jury trial, Turner was found guilty of child molesting and one count of criminal deviate conduct. It is from these convictions that he now appeals.

Turner first contends that the trial court erred when it allowed into evidence the inculpatory statement he made to the police. Specifically, he argues that his statement

was not admissible because he was not given his *Miranda*[1] rights prior to making the statement.

Prior to trial, Turner filed a motion to suppress his statement, which the trial court denied. Turner renewed his objection to this evidence at trial, and the trial court overruled the objection and admitted the evidence of Turner's statement. The question on appeal is not whether the trial court erred in denying Turner's motion to suppress, but whether the trial court erred in admitting the evidence at trial. Accordingly, our standard of review is that utilized for issues regarding the admission or exclusion of evidence at trial. *See Kelley v. State*, 825 N.E.2d 420, 424-25 (Ind. Ct. App. 2005) (stating that once case proceeds to trial, question of whether trial court erred in denying motion to suppress is no longer viable and defendant's only available argument on appeal is whether trial court erred in admitting evidence at trial).

The admissibility of evidence is within the sound discretion of the trial court, and we will not disturb the decision of the trial court absent a showing of abuse of that discretion. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Rights under *Miranda* apply only to custodial interrogation. *Richardson v. State*, 794 N.E.2d 506, 512 (Ind. Ct. App. 2003), *trans. denied*, 804 N.E.2d 755. Accordingly, the two elements to analyze in deciding whether a defendant's rights were violated are:

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

(1) custody and (2) interrogation. In this case, the parties do not contest that Turner was being interrogated at the time he gave this statement. Thus, the crucial question is whether he was in custody for purposes of *Miranda*. We apply an objective test to determine if someone is in custody: whether a reasonable person under the same circumstances would believe themselves to be under arrest or not free to resist the requests of the police. *McIntosh v. State*, 829 N.E.2d 531, 537 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*, 841 N.E.2d 185.

Here, Detective Kirby with the Danville Police Department attempted to contact Turner several times in order to speak with him regarding B.T.'s allegations. Finally, Detective Kirby obtained Turner's address and went to Turner's home. Detective Kirby testified at trial that he identified himself to Turner and advised Turner that he needed to speak with him. Detective Kirby asked if he could enter Turner's residence, and explained to Turner that he was not under arrest and that he was not going to be arrested that day. Turner invited the detective to come in. Their conversation lasted between thirty minutes and one hour. During that time, Turner admitted to one incident of fondling that he indicated occurred at their grandmother's house but denied any other incidents. In addition, Detective Kirby testified that he did not threaten Turner and that their conversation was cordial. Based upon these facts, we conclude that a reasonable person in Turner's circumstances would not have believed himself to be under arrest or not free to resist the requests of the police. Turner was not in custody, and, therefore, did not require *Miranda* warnings.

Next, Turner asserts that the trial court erred by admitting into evidence statements of B.T. under the protected persons statute. Ind. Code § 35-37-4-6, commonly referred to as the protected persons statute, allows hearsay statements of child sex crime victims, among others, to be admissible at trial when certain conditions are met. Ind. Code § 35-37-4-6 provides, in pertinent part:

> (e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
> (1) The court finds, in a hearing:
> (A) conducted outside the presence of the jury; and
> (B) attended by the protected person;
> that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.
> (2) The protected person:
> (A) testifies at the trial;
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> **********

In this case, the trial court held the hearing required by subsection (e), at which B.T., D.H., Debra Berkey, a caseworker for the Department of Child Services, and, Dianna Turner, B.T.'s mother, testified and were subject to cross-examination. The trial court determined that B.T.'s hearsay statements to D.H., Debra Berkey, and Dianna Turner were sufficiently reliable and therefore admissible at trial. At trial, however, Turner challenged only the admission of the statements B.T. made to his mother and his cousin. Therefore, on appeal, we will address only those statements for which Turner preserved the error for appeal. *See O'Neal v. State*, 716 N.E.2d 82, 86 (Ind. Ct. App. 1999), *reh'g denied*, *trans. denied*, 735 N.E.2d 219 (2000) (holding that defendant must make timely objection to allegedly erroneous admission of evidence to preserve error for

appeal). Further, just as we did in Issue I, above, we review the admission of this evidence for an abuse of the trial court's discretion. *See Gibson*, 733 N.E.2d at 951. Although we follow the typical standard of review for the admission of evidence on this issue, the appellate courts of this state have emphasized that the trial court's responsibilities under the protected persons statute carry with them "a special level of judicial responsibility." *Carpenter v. State*, 786 N.E.2d 696, 703 (Ind. 2003).

Turner claims that the trial court should not have allowed into evidence the statements made by B.T. to his mother and D.H. because they are not sufficiently reliable. We are instructed that, in making the reliability determination under Ind. Code § 35-37-4-6, factors to be considered include the time and circumstances of the statement, whether there was significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, use of age appropriate terminology, and spontaneity and repetition. *Taylor v. State*, 841 N.E.2d 631, 635 (Ind. Ct. App. 2006), *trans. denied*; *see also Trujillo v. State*, 806 N.E.2d 317, 325 (Ind. Ct. App. 2004). Turner specifically argues that the statements made by B.T. to his mother and D.H. were not spontaneous or contemporaneous to the event, the statements were not corroborated, B.T. does not know the difference between the truth and a lie, and B.T. had a motive to fabricate.

Turner avers that B.T.'s statements were not spontaneous or contemporaneous because the statements were describing an act that occurred two to three years earlier. However, B.T.'s statements are not rendered automatically unreliable merely because two to three years had passed from the time of the incident between B.T. and Turner and

the time of B.T.'s statement to his parents. While expressing concern that the passage of time tends to diminish spontaneity and increase the likelihood of suggestion, this court has also recognized that there are undoubtedly many other factors in each individual case to be considered. *See Taylor*, 841 N.E.2d at 636. Here, B.T.'s mother, Dianna Turner, testified at the hearing on the protected persons statute that the suspicious behavior between B.T. and D.H. prompted her and B.T.'s father to directly question B.T. about his behavior. During that discussion, they asked B.T. if he had ever been touched by anyone, and B.T. disclosed that he had been touched by Turner. B.T.'s statement was a spontaneous response to his parents' broad question during their discussion with B.T. about his current behavior with his cousin, D.H. B.T.'s parents neither assumed nor suggested that he had been touched by anyone nor did they suggest the identity of anyone who may have touched him. B.T.'s parents testified they were shocked and stunned to hear what had happened between their older son and B.T. *See e.g.*, *Taylor*, 841 N.E.2d at 636 (concluding that child victim's statement to mother was spontaneous when, upon being questioned about her behavior, child "just came out and told" mother of molestation); *see also M.T. v. State*, 787 N.E.2d 509, 512 (Ind. Ct. App. 2003) (determining that statement by child victim to her mother was spontaneous where statement was unsolicited and was made when mother was treating rash on child). B.T.'s statement to his parents was spontaneous.

Additionally, D.H. testified regarding B.T.'s statements to him that it was all right to do what they were doing together because Turner had done it to B.T. and had told him it was okay. Although B.T. was again referring to an act that happened several years

earlier, his statement to D.H. was nonetheless spontaneous. B.T. made the statement to D.H. as the two boys were engaging in inappropriate conduct together, and B.T. was explaining to D.H. why their conduct was acceptable. Thus, B.T.'s statement to D.H. was spontaneous.

Turner next contends that B.T.'s statements are not sufficiently reliable because they were not corroborated. This argument is for naught. Corroboration should not be considered when evaluating the reliability of a statement. *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997); *see also M.T.*, 787 N.E.2d at 512. Ind. Code § 35-37-4-6 does not limit admission of statements only to cases in which there is independent corroborative evidence of the crime. *Id.*

Based upon an apparent misstatement by B.T., Turner alleges that B.T.'s statements do not have sufficient indications of reliability because B.T. does not know the difference between the truth and a lie. In his brief, Turner provides no argument as to this contention but instead merely cites to a page of the transcript where the State has just begun to question B.T. at the protected persons hearing. The State asked B.T., "Do you know what the difference is between telling the truth and telling a lie?" B.T. responded, "No." Tr. at 112. However, the State went on to question B.T. about the difference between the truth and a lie, using examples, and B.T. demonstrated that he understood these two concepts. B.T. also promised to be truthful in his testimony and acknowledged that he understood the consequences of lying while testifying. It was established that B.T. could distinguish between the truth and a lie.

Lastly, Turner states that B.T.'s statements to his mother and his cousin are not sufficiently reliable because B.T. had a motive to fabricate. He refers to B.T.'s testimony that B.T. believed he would be in trouble when his parents found out the activities in which he and his cousin, D.H., had been engaging, and he speculates that B.T. fabricated the story about Turner molesting him in order to avoid getting into trouble with his parents. A review of the transcript reveals nothing that indicates that B.T. fabricated the story about Turner in order to avoid upsetting his parents. In fact, B.T. was specifically asked about this scenario at the protected persons hearing.

STATE: Okay. When you told your mom and dad that [Turner] had done it to you, were you telling the truth?

B.T.: Yes.

STATE: Or were you, did you think you were in trouble and you were just lying?

B.T.: I, I thought I would be in trouble.

STATE: Okay. So you thought you'd be in trouble for what you were doing?

B.T.: Yes.

STATE: So did you lie and say that [Turner] had done something that he really didn't do?

B.T.: No.

STATE: Okay. Why were you afraid you were going to be in trouble?

B.T.: 'Cause I, I was afraid of what my mom and my dad might say.

STATE: Okay. And so when you were talking about [Turner] doing something, I want to make sure I'm clear, is that because it

really happened or were you telling something that didn't happen?

B.T.: It happened.

Tr. at 118-19. In addition to this testimony, Turner had the opportunity to cross-examine B.T. on this subject at the protected persons hearing, and the trial court was able to assess B.T.'s credibility. Moreover, had B.T. been disposed to fabricate a story, he could have named anyone as the perpetrator, rather than implicating Turner. There was no suggestion of any reason B.T. would have to make up allegations about Turner. In addition, B.T. gave a solid account of how and when the molestations occurred, and B.T.'s mother testified that B.T. was not in trouble over the incident. We observe no motive to fabricate. Based upon these facts and circumstances, we conclude that the trial court did not abuse its discretion when it determined that B.T.'s statements to his mother and his cousin provide sufficient indications of reliability and were thus admissible pursuant to Ind. Code § 35-37-4-6.

For his third assertion of error, Turner claims that the State's evidence was insufficient to sustain his convictions. Particularly, he asserts that the evidence regarding the dates of the occurrences and the use of force was inadequate.

Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond

a reasonable doubt, we will affirm the conviction. *Id*. A conviction for child molesting may rest solely upon the uncorroborated testimony of the victim. *Turner v. State*, 720 N.E.2d 440, 447 (Ind. Ct. App. 1999). Moreover, we are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

The State charged that the acts alleged occurred on or between September 26, 2001 and November 2002. At trial, B.T. testified that these events occurred when the family was living with B.T. and Turner's paternal grandmother when she was sick and when B.T. was between the ages of five and seven. On cross-examination, although the transcript reveals some confusion, B.T. further explained that the molestations occurred once while the boys were visiting their grandmother and twice while they were living with their grandmother. In addition, B.T.'s videotaped statement to Debra Berkey, a caseworker for the Department of Child Services, was admitted into evidence at trial. In that statement, B.T. stated that the incidents of molestation occurred at his grandmother's house when he was in second grade and his grandmother was very sick. B.T.'s mother, Dianna Turner, verified in her testimony that the family lived with her husband's mother from September 2001 through November 2002. Debra Berkey testified at trial that B.T. had related to her that the incidents had occurred at the home of B.T.'s grandmother and that the grandmother was home at the time but was ill. B.T. also indicated that he was in second grade and was seven years old at the time these events took place.

We do not judge credibility on appellate review. *See Newman*, 677 N.E.2d at 593. Although B.T. appeared to become confused when questioned on cross-examination at

trial, his testimony of the time period of these occurrences is consistent with the State's charging information. It is the function of the trier of fact to resolve conflicts in testimony and to determine the weight of the evidence and the credibility of the witnesses. *K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001). We will not disturb the jury's determination.

In Count 2, the State charged Turner with criminal deviate conduct as a Class B felony based upon allegations that Turner forced B.T. to perform oral sex on him. Ind. Code § 35-42-4-2(a)(1) provides that a person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when the other person is compelled by force or imminent threat of force, commits criminal deviate conduct as a Class B felony. Turner avers that the State failed to show the use of force or the imminent threat of force in order to support his conviction of this offense.

We observe that the determination of the presence of force is a subjective test that looks to the victim's perception of the circumstances surrounding the incident. *Ruth v. State*, 706 N.E.2d 257, 258 (Ind. Ct. App. 1999). Thus, it is the victim's perspective, not the assailant's, from which the presence of force is to be determined. *Id*. Further, we note that the force need not be physical or violent but may be implied from the circumstances. *Scott-Gordon v. State*, 579 N.E.2d 602, 604 (Ind. 1991). Here, B.T testified that Turner would do something to make B.T. mad so that B.T. would go back to Turner's bedroom to "get back at him." Tr. at 403. Once B.T. was in Turner's bedroom, Turner would lock the door. Turner would then pull down B.T.'s pants, pull down his own pants, and tell B.T. to touch his "wiener." Tr. at 404. B.T. stated that he would try

to push Turner away and unlock the door to get away from Turner but that Turner would pull him back. Additionally, B.T. stated that Turner told him to touch Turner with his hands and his mouth and that Turner told B.T. not to tell anyone. Furthermore, B.T. stated that the events that occurred were not things B.T. wanted to happen. This evidence is sufficient to support the jury's conclusion that Turner compelled B.T., by force or the imminent threat of force, to perform oral sex. *See e.g.*, *Morrison v. State*, 824 N.E.2d 734, 742-43 (Ind. Ct. App. 2005), *trans. denied*, 831 N.E.2d 749 (holding that evidence of victim trying unsuccessfully to get away from defendant was sufficient to support conclusion that defendant compelled victim to submit to attempted deviate conduct by force or the imminent threat of force).

Lastly, Turner contends that the trial court erred by denying his motion for judgment on the evidence. In order for a trial court to properly grant a motion for judgment on the evidence, there must be either a total lack of evidence regarding an essential element of the crime, or the evidence must be without conflict and susceptible only to an inference in favor of the defendant's innocence. *Proffit v. State*, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 735 (2005). A motion for judgment on the evidence is properly denied when the evidence is sufficient to sustain a conviction upon appeal. *Id*. Therefore, our standard of review is the same as that for a challenge to the sufficiency of the evidence. *Id*. Accordingly, we will review this issue under the standard of review we previously set forth for review of claims of insufficient evidence.

Turner alleges that the trial court should have granted his motion for judgment on the evidence because B.T.'s testimony is incredibly dubious and, hence, not capable of supporting Turner's convictions. The incredible dubiosity doctrine applies "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt." *Thompson v. State*, 765 N.E.2d 1273, 1274 (Ind. 2002). This Court has observed that application of this doctrine is rare, but, when it is used, the applicable standard is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id*.

In his brief, Turner lists the discrepancies that serve as the basis for his argument that B.T.'s testimony is incredibly dubious. However, the rule of incredible dubiosity does not apply to the majority of these statements because they are statements that B.T. made prior to trial. The rule of incredible dubiosity concerns in-court testimony rather than statements made outside of trial or the courtroom. *Reyburn v. State*, 737 N.E.2d 1169, 1171 (Ind. Ct. App. 2000). Nevertheless, these out-of-court statements may be used for impeachment purposes at trial. *See* Ind. Evidence Rule 613. In point of fact, B.T. was vigorously questioned on cross-examination, and defense counsel used B.T.'s prior statements to Debra Berkey and during his deposition, to impeach his trial testimony.

Although our review of the transcript reveals a time when B.T. did contradict himself at trial, both the State and defense counsel vigorously questioned him about it. Moreover, the statement was concerning the activities between B.T. and his cousin, not

B.T. and Turner, such that they went to B.T.'s overall credibility and not to establishing the elements of the offenses with which Turner has been convicted. With regard to the evidence establishing the elements of Turner's offenses, there are times when B.T. was confused, but his testimony does not rise to the level of being incredibly dubious. Put another way, his testimony is not so inherently improbable that no reasonable person could believe it. Moreover, defense counsel fervently cross-examined B.T. at trial in an attempt to uncover inconsistencies in his story. It was for the jury to decide how to weigh B.T.'s credibility in light of all this information, and, in the absence of incredibly dubious testimony, we will not impinge on the jury's responsibility to judge witness credibility. On appeal, Turner is merely inviting this Court to invade the province of the jury by reweighing the evidence and reassessing witness credibility. We must decline this invitation. As for the broader question of sufficiency, we again note that a conviction for child molesting may rest solely upon the uncorroborated testimony of the victim. *Turner*, 720 N.E.2d at 447. The evidence is sufficient to support the conviction.

Based upon the foregoing discussion and authorities, we conclude that Turner's statements to Detective Kirby were not the product of custodial interrogation and were, therefore, properly admitted into evidence at trial. In addition, B.T.'s statements to his mother and his cousin were properly admitted into evidence under the protected persons statute. Further, the State presented sufficient evidence to support Turner's convictions, and B.T.'s testimony was not incredibly dubious.

Affirmed.

SULLIVAN, J., and BAILEY, J., concur.